Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERTO CERVANTES-MANZO,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ELISABETH S. BRODYAGA
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226
Attorney for
Roberto Cervantes-Manzo,

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

A. Whether Congress intended that the original jurisdiction vested in the courts of appeals by the §106(a)(1)(iii) of the REAL ID Act of 2005, codified at 8 U.S.C. §1252(a)(2)(D), over "constitutional claims [and] questions of law," be coextensive with the scope of review previously exercised through the habeas corpus jurisdiction it replaced, and therefore intended that it include review of such issues as whether the Board of Immigration Appeals, ("BIA"):

1) applied an incorrect standard of law;

2) erred in the application of the law to the facts; and/or

3) deprived an immigrant of due process of law; and, if so,

B. Whether the Seventh Circuit erred in failing to address Petitioner's claims that the Immigration Judge and BIA adjudicated his case under an incorrect standard of law, by failing to consider the "totality of the circumstances" presented, as required by BIA precedent,[1] and that this failure deprived him of due process.

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[1] *See, e.g., In re W-F-*, 21 I&N Dec. 503 (BIA 1996) (in determining whether an alien's failure to appear is excused under 8 U.S.C. §§1252b(c)(3)(A) and (f)(2) (1996), the BIA considers the "totality of the circumstances").

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner Roberto Cervantes-Manzo was the Respondent before the Executive Office for Immigration Review, and the Petitioner before the Seventh Circuit Court of Appeals. The Respondent before the Seventh Circuit was the United States Attorney General.

REFUGIO DEL RIO GRANDE, Inc., which is filing the instant petition on behalf of Petitioner, is a not for profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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I. PETITION FOR WRIT OF CERTIORARI

Roberto Cervantes-Manzo petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in his case. The primary issue presented is whether Congress intended that jurisdiction over "questions of law," as that phrase is used in §106(a)(1)(iii) of the REAL ID Act of 2005, codified at 8 U.S.C. §1252(a)(2)(D), be co-extensive with the scope of review of such questions previously exercised through the habeas corpus jurisdiction it replaced, and therefore intended that it include review of questions such as whether the BIA applied an incorrect standard of law in adjudicating an appeal, and/or erred in the application of law to the facts, and whether these failings resulted in a deprivation of due process. *See*, *INS v. St. Cyr,* 301 U.S. 289, 302 (2001) (noting that habeas jurisdiction encompassed "errors of law, including the erroneous application or interpretation of statutes"); *U.S. ex rel. Hintopoulos v. Shaughnessy,* 353 U.S. 72, 78 (1957) (addressing, and rejecting, claim that the BIA "applied an improper standard when exercising its discretion" by considering the congressional policy underlying a concededly inapplicable statute).

Although the legislative history of the REAL ID Act contains language indicating that the intended scope of the phrase "questions of law" was limited to questions of statutory construction,[2] there is also language evidencing

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[2] *See, Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005):

> Should there be any doubt about the meaning of the term "questions of law" in the REAL ID Act, the legislative history makes it abundantly clear this term refers to a narrow category of issues regarding statutory construction. For example, the Conference

(Continued on following page)

an intent that it be co-extensive with the scope of review previously available in habeas corpus.[3] In the instant case, the Seventh Circuit found that it lacked jurisdiction because the issues presented were not "strictly legal questions," App. at p.2.[4] This is inconsistent with the legislative history, as quoted above, which specifically mentions jurisdiction over the legal aspects of mixed questions of law and fact. It is also inconsistent with the extensive body of habeas corpus law developed during the first half of the twentieth century. *See, e.g., St. Cyr, supra* at 308:

> Committee Report states "[T]he purpose of [§ 106] is to permit judicial review over those issues that were historically reviewable on habeas – *constitutional and statutory-construction* questions, not discretionary or factual questions." Conference Committee Statement, 151 Cong. Rec. H2813-01, H2873, 2005 WL 1025891 (May 3, 2005) (emphasis added). . . .
>
> Likewise, although the final bill deleted an amendment that would have qualified the term "questions of law" with the word "pure," the Conference Report explains that "pure" was deleted from the final version of the legislation because it was viewed as superfluous. *Id.*

[3] *See,* H.R.Rep. No. 109-72, at 175 (2005), *as quoted in Brue v. Gonzales*, 464 F.3d 1227, 1231 (10th Cir. 2006):

> [T]he purpose of [§ 1252(a)(2)(D)] is to permit judicial review over those issues that were historically reviewable on habeas-constitutional and statutory-construction questions, not discretionary or factual questions. When a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements.

[4] This may be attributable in part to the fact that *St. Cyr* involved statutory construction, which this Court repeatedly characterized as a "pure" question of law. *See, e.g., id.* at 300:

> A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions.

> Indeed, under the pre-1952 regime which provided only what *Heikkila*[5] termed the constitutional minimum of review, on habeas lower federal courts routinely reviewed decisions under the Seventh Proviso, the statutory predecessor to § 212(c), to ensure the lawful exercise of discretion.

Before the Seventh Circuit, Mr. Cervantes argued that the BIA applied an incorrect standard of law by failing to consider the "totality of circumstances" in adjudicating his case.[6] The Seventh Circuit's finding that it lacked jurisdiction over this claim because it was not a "strictly legal issue[]"[7] raises precisely the same "substantial constitutional questions" that this Court recognized, and avoided, in *St. Cyr*, *supra* at 300.[8] He also urged that the BIA's decision resulted in a deprivation of due process, which argument the Seventh Circuit neglected to address.

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[5] *Heikkila v. Barber,* 345 U.S. 229 (1953).

[6] *See, e.g., In Re W-F-*, 21 I&N Dec. 503, 509 (BIA 1996) (BIA considers "totality of the circumstances" in determining whether failure to appear is excused under 8 U.S.C. §1252b(f)(2) (1996)).

[7] Appendix ("App."), *infra,* at p.2. The Court also overlooked Mr. Cervantes' due process claim. *Id.*

[8] *C.f., Swain v. Pressley,* 430 U.S. 72 (1977) (Substitution of collateral remedy which is neither inadequate nor ineffective to test legality of challenged detention does not constitute suspension of writ of habeas corpus in violation of Constitution). *See also, Xiao Ji Chen v. Gonzales*, 471 F.3d 315, 324-30 (2nd Cir. 2006) (examining legislative history, and rejecting prior holding that "questions of law" referenced only statutory construction, and concluding that it covered all legal questions which would have been reviewable in habeas corpus).

II. OPINIONS BELOW

The decision of the Seventh Circuit herein was unreported. App. at p.1. The decisions of the BIA and immigration judge, ("IJ"), were also unreported. *Id.* at pp.4-5, 6-9.

III. JURISDICTION

The judgment of the Seventh Circuit was entered October 20, 2006. App. at p.1. Petitioner's timely petition for rehearing was denied November 13, 2006. *Id.* at p.20. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV. STATUTORY PROVISIONS INVOLVED

The instant case involves §106 of the REAL ID Act of 2005, the pertinent sections of which are set forth in the Appendix, *infra*, at pp.21-23. Also involved are 8 U.S.C. §§1252b(c)(1); (3)(A) and (f)(2) (1996):

> (c) Consequences of failure to appear
> (1) In general
> Any alien who, after written notice required under subsection (a)(2) of this section has been provided to the alien or the alien's counsel of record, does not attend a proceeding under section 1252 of this title, shall be ordered deported under section 1252(b)(1) of this title in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is deportable. . . .
> . . .
> (3) Rescission of order
> Such an order may be rescinded only –
> (A) upon a motion to reopen filed within 180 days after the date of the order of deportation if the

alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section),

. . .

(f) Definitions
In this section:

. . .

(2) The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances) beyond the control of the alien.

V. STATEMENT OF THE CASE

A. INTRODUCTION

Roberto Cervantes seeks review of the Seventh Circuit's holding that, while the REAL ID Act of 2005 allowed it to exercise jurisdiction over "strictly legal issues," App. at p.2, it lacked jurisdiction over the issues raised in his petition for review. Mr. Cervantes urged that the BIA failed to apply the proper legal standard because it considered only one factor, not the "totality of circumstances" as required by BIA precedent and federal case law, in determining whether his failure to appear was excused under 8 U.S.C. §§1252b(c)(3)(A) and (f)(2) (1996). He also asserted that the BIA's decision deprived him of due process, App. at p.48. The Seventh Circuit characterized these claims as a contention that the BIA "erred in balancing multiple factors under an open ended standard," and concluded that such claims were not a "legal argument." App. at p.2. Mr. Cervantes asserts that this conclusion is inconsistent with the legislative history of the REAL ID Act of 2005, with various decisions of this Court, including *INS v. St.*

Cyr, 533 U.S. 289 (2001), and with the published opinions of the other courts of appeal which have examined the scope of review available under 8 U.S.C. §1252(a)(2)(D).[9] He also urges that it constitutes an unconstitutional suspension of the Great Writ.

B. THE FACTUAL AND PROCEDURAL BACKGROUND

Roberto Cervantes-Manzo is a 70-year-old Mexican national who has been a lawful permanent resident, ("LPR"), since 1961, and is in failing health. His extensive family ties in the United States include his U.S. citizen wife, five children, two siblings, and various grandchildren. He and his wife own two businesses, with numerous employees. App. at pp.17, 29-33, 40.

Mr. Cervantes was twice convicted of drug trafficking offenses: once in 1972, and again in 1993. Following his second conviction, he was placed in deportation proceedings. He admitted deportability, and sought relief under (then) §212(c) of the Act.

While the proceedings were pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, PL 104-208, Division C, ("IIRIRA"), which *inter alia,* repealed §212(c) of the Immigration and Nationality Act. As a result, on May 13, 1997, Immigration Judge Anthony Petrone found him ineligible for relief, and ordered his deportation. App. at pp.17-19.

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[9] *See, e.g., Xiao Ji Chen v. Gonzales, supra,* and *Kaweesa v. Gonzales,* 430 F.3d 62 (1st Cir. 2006).

Mr. Cervantes appealed to the BIA. He also filed a petition for habeas corpus with the U.S. District Court for the Northern District of Illinois, Eastern Division. No. 99-C-1896. A copy of the petition was served on Jennie Giambastiani, then an INS Deputy District Counsel. The habeas petition was denied, as was the appeal to the BIA. Mr. Cervantes sought review of these decisions before the Seventh Circuit, which dismissed both for lack of jurisdiction. *Cervantes-Manzo v. INS,* 234 F.3d 1272 (7th Cir. 2000) (Table); App. at p.46.

Shortly thereafter, however, this Court decided *INS v. St. Cyr, supra*, holding that long-term LPRs such as he who had pled guilty to deportable offenses prior to the repeal of §212(c) of the Act, retained eligibility if they were eligible for such relief at the time of their pleas. After implementing regulations were promulgated, Mr. Cervantes filed a motion to reopen his case. In the name of Jennie Giambastiani, (who had by then been promoted to INS District Counsel), INS opposed the motion. However, the BIA granted it, and remanded for a hearing on the application for §212(c) relief. App. at pp.12, 24.

On remand, the case was reassigned to Jennie Giambastiani, who was by then an Immigration Judge. The case was rescheduled seven times, largely for procedural reasons, and Mr. Cervantes never failed to appear. It was delayed at one point because he changed attorneys, and at least once for administrative reasons within the Immigration Judge's office. On May 17, 2005, Mr. Cervantes and his attorney appeared for the "Individual hearing," ready to proceed with the hearing on the merits of his §212(c) application. Numerous documents were introduced, but the Judge refused to go forward, demanding proof that Mr. Cervantes had not been convicted of any other offenses.

Three days later, she mailed a notice rescheduling the case for another Master hearing, (*i.e.,* a procedural hearing), on June 21, 2005. Because his counsel had a conflict, the case was rescheduled, still for a Master hearing, on October 11, 2005. App. at pp.14, 24, 25, 28, 29, 34, 35, 36, 37, 38, 39.

On that date, counsel appeared, with the evidence the Judge had requested. However, for the first time in his decade-long struggle to win §212(c) relief, Mr. Cervantes failed to appear. Although she had discretion to either waive his presence, or grant a brief continuance, the Judge refused to do either. Instead, she found that Mr. Cervantes had abandoned his application for relief, and ordered his deportation. The form Order incorrectly asserted that the hearing had been set for the merits of his application. App. at pp.6-8, 9, 25.

Three days later, Mr. Cervantes filed a motion to reopen, explaining that he had not appeared because (at age seventy), he had been confused as to the date. He also explained that when his counsel attempted to call him from Court, he had been out of the range of his cell phone. The Judge denied the motion, reasoning, App. at p.7, that:

> [Mr. Cervantes] was provided with his hearing date at an earlier hearing and it was only through his own error that he mis-calendared the hearing date. He also failed to maintain contact with his attorney prior to the hearing thus missing an opportunity to ensure his appearance on the correct date and at the correct time. Therefore, I find that the respondent failed to appear not due to exceptional circumstances but due to less compelling circumstances, namely, his failure to take all necessary and diligent action in advance of the actual hearing date.

Mr. Cervantes appealed to the BIA. He argued that Judge Giambastiani had failed to consider the "totality of the circumstances," as mandated by BIA precedent, and that she was, in any event, predisposed to deny relief. The BIA dismissed the appeal, "adopt[ing] and affirm[ing] the decision of the Immigration Judge." The BIA concurred that Mr. Cervantes' confusion was not an "exceptional circumstance" within the meaning of 8 U.S.C. §1252b(f)(2) (1996), and opined that he had "provided no evidence in support of his contention" that the IJ was biased or predisposed to deny him relief. Like the Judge, however, and contrary to BIA precedent, the Board failed to consider the totality of circumstances in evaluating Mr. Cervantes' appeal. App. at pp.4-5.

Mr. Cervantes sought review from the Seventh Circuit, raising both questions of law and constitutional claims.[10] He urged that the BIA "failed to apply the proper legal standard" in adjudicating his appeal, and that its decision deprived him of due process of law. App. at p.51. Specifically, he argued that both the BIA and IJ failed to consider the "totality of the circumstances" in determining whether rescission of an *in absentia* order of deportation is appropriate, and that this failure resulted in a denial of due process. *See, Kaweesa, supra*, 450 F.3d at 69-70 (footnotes in original) (emphasis added):

[10] Apparently considering them necessary to show bias on the part of the IJ, Mr. Cervantes unsuccessfully moved to supplement the record with the transcripts of the hearings conducted before Judge Giambastiani, arguing that he "intended to rely" on them in his appeal. App. at pp.43-44. *See also,* Docket Sheet, #06-2163, entries dated 7/7/06, 7/25/06 and 7/26/06, available on PACER.

"At the core of these due process rights is the right to notice of the nature of the charges and a meaningful opportunity to be heard." *Choeum,* 129 F.3d at 38. These core concerns animate the provisions in 8 U.S.C. § 1229a that govern motions to reopen *in absentia* removal orders.FN12 Where an alien misses a hearing due to lack of notice or exceptional circumstances, due process concerns, i.e., the right to notice and a meaningful opportunity to be heard, are implicated.FN13 **In our view, one reason the Immigration Judge must consider the totality of the circumstances in deciding the validity of a claim of exceptional circumstances is to ensure that an alien is not deprived of a meaningful opportunity to be heard.**

FN12. These concerns have led to decisions requiring the BIA to reopen proceedings in a number of different factual scenarios. *See, e.g., Lo v. Ashcroft,* 341 F.3d 934, 939 (9th Cir.2003) (requiring the BIA to open proceedings because of counsel's ineffective assistance); ***Barseghian,* 14 Fed.Appx. at 807-08 (9th Cir. 2001) (requiring the BIA to reopen proceedings where the petitioner innocently mistook the date of his hearing);** *Nazarova v. INS,* 171 F.3d 478, 485 (7th Cir.1999) (requiring the BIA to reopen proceedings where the petitioner's late arrival was caused by her translator); ***Romero-Morales v. INS,* 25 F.3d at 131 (vacating the denial of the motion to reopen because of the IJ's failure to examine the particulars of the case).**

FN13. We wish to be clear that we are not saying that due process concerns dictate than an alien who demonstrates exceptional circumstances *must* have his or her motion to reopen granted.

> This is essentially the argument we discussed above and declined to reach, *see supra* note 11. All we are saying is that due process considerations are at work in the background of the provisions in 8 U.S.C. § 1229a.

On October 20, 2006, the Seventh Circuit dismissed Mr. Cervantes' petition for lack of jurisdiction. As the Court reasoned, App. at p.2:

> Although the REAL ID Act of 2005 permits review of strictly legal issues, see, 8 U.S.C. §1252(a)(2)(D), a contention that the agency has erred in balancing multiple factors under an open-ended standard is not a legal argument. *Tunis v. Gonzales,* 447 F.3d 547 (7th Cir. 2006); *Bokai* [sic] *v. Gonzales*, 447 F.3d 1, 4 (1st Cir. 2006).

Mr. Cervantes filed a petition for rehearing, which was denied on November 13, 2006. App. at 20.

VI. REASONS FOR GRANTING THE WRIT

This Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *See, e.g., Lopez v. Gonzales,* 127 S.Ct. 625 (2006); *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006); *Leocal v. Ashcroft,* 543 U.S. 1 (2004); *Demore v. Kim,* 538 U.S. 510 (2003). The Court also grants certiorari where Circuit Court opinions are in conflict with prior Supreme Court precedent. *See, e.g., Clark v. Martinez,* 543 U.S. 371 (2005). Both aspects are presented herein.

A. THE CONCLUSION OF THE SEVENTH CIRCUIT HEREIN THAT IT LACKED JURISDICTION OVER PETITIONER'S CLAIMS CONFLICTS WITH THIS COURT'S PRIOR AUTHORITY, AND RAISES SERIOUS CONSTITUTIONAL ISSUES.

In *St. Cyr,* this Court discussed the history of habeas corpus at great length, noting that it had historically been used to challenge "detentions based on errors of law, including the erroneous application or interpretation of statutes." *Id.,* 533 U.S. at 302. Cited with approval therein was *United States ex rel. Hintopoulos v. Shaughnessy, supra,* wherein, as here, the issue was whether the BIA had applied an incorrect legal standards in making a discretionary determination. 353 U.S. at 77-78.

Mr. Cervantes also argued that, under *Kaweesa, supra,* 450 F.3d at 69-70, the denial of his motion to reopen resulted in a due process violation. App. at p.48. Although the Seventh Circuit did not address this claim in the Order dismissing his petition for lack of jurisdiction, the implicit finding that this did not raise a constitutional claim within the meaning of §1252(a)(2)(D) conflicts with various decisions of this Court, including *U.S. ex rel Accardi v. Shaughnessy,* 347 U.S. 260 (1954) (finding that the claim that the BIA did not abide by the regulations alleged a due process violation).

B. THE DECISION HEREIN ALSO CONFLICTS WITH PRECEDENT FROM EVERY OTHER COURT OF APPEALS WHICH HAS ADDRESSED THIS OR SIMILAR ISSUES.

The Seventh Circuit herein concluded that the legal test for determining whether "exceptional circumstances"

have been shown, such that reopening is appropriate under 8 U.S.C. §1252b(c)(3)(A) and (f)(2) (1996), was such an "open-ended" standard that the Court lacked jurisdiction over a claim that the BIA failed to apply the correct legal standard. This is in direct conflict with a decision of the First Circuit under virtually identical circumstances. *See, Kaweesa v. Gonzales,* 450 F.3d at 71:

> [B]ecause the IJ must consider the totality of the circumstances, and because it is plain that the IJ looked no further than the fact that Kaweesa mixed up the dates, the IJ committed an error of law.

See also, Romero-Morales v. INS, 25 F.3d 125, 130 (2nd Cir. 1994):

> At oral argument in this case, the government contended that because of section 242B the IJ did not have the power to grant a short adjournment. We disagree.

And *id.*, 25 F.3d at 131:

> [W]e find disquieting the IJ's failure to examine the particulars of the case before him prior to either issuing the in absentia ruling or denying the motion to reopen – a failure that we ascribe to the IJ's mistaken belief that he was statutorily precluded from doing so.

The Seventh Circuit's conclusion that Mr. Cervantes' petition did not present a "question of law" also conflicts with precedent from every court of appeals which has addressed the issue. Whether his claim was viewed as asserting that the BIA applied an incorrect standard or law, or misapplied the correct standard, such a challenge would be considered to be a "question of law" by every

court of appeals which has addressed the scope of jurisdiction under §1252(a)(2)(D). *See, Munoz-Yepez v. Gonzales,* 465 F.3d 347, 351 (8th Cir. 2006) ("Though Munoz-Yepez has failed to persuade us that the IJ misinterpreted the Supreme Court's decision in *St. Cyr,* or the scope of § 212(c) relief, or the meaning of the term "admission" in the current INA, or his due process right to simultaneous proceedings, these are questions of law and constitutional claims within the meaning of § 1252(a)(2)(D)"); *Berhe v. Gonzales,* 464 F.3d 74, 87 (1st Cir. 2006) ("[T]his case is controlled by *Enwonwu. See* 438 F.3d at 35 (holding that, where the Board's reversal of an immigration judge's grant of relief under the CAT only addressed one of the two findings made by the judge in support of its decision, the Board's opinion was 'insufficiently reasoned as a matter of law')."); *Alaka v. Gonzales*, 456 F.3d 88, 103 (3rd Cir. 2006) ("Whether an IJ applied the correct legal standard is a question of law"); *Okafor v. Gonzales,* 456 F.3d 531, 533 (5th Cir. 2006) ("this petition presents a question of law rather than a question of fact because both sides agree about the underlying factual sequence and disagree only about the *legal significance* of those facts."); *Tran v. Gonzales,* 447 F.3d 937, 943 (6th Cir. 2006) ("Pursuant to § 1252(a)(2)(C) and (D), our review of Tran's CAT claim is limited to questions of law or constitutional issues. Therefore, our jurisdiction is limited to the legal issues Tran presents – whether the BIA used the correct standard in reviewing the IJ's decision and whether it assigned to him the correct burden of proof"); *Singh v. Gonzales,* 432 F.3d 533, 537-538 (3rd Cir. 2006) ("we have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to consider Singh's CAT and withholding of removal claims to the extent they present questions of law, or of the application of law to undisputed fact."); *Kamara v. Gonzales*, 420 F.3d 202, 211 (3rd Cir. 2005)

(finding jurisdiction under REAL ID Act to review legal determinations and application of law to fact under the CAT)"); *Grass v. Gonzales,* 418 F.3d 876, 879 (8th Cir. 2005) ("*Accardi* suggests that the Attorney General's adoption of a policy declaring how his discretion will be exercised, or his failure to follow an existing policy, may in some circumstances raise a question of law reviewable under 8 U.S.C. § 1252(a)(2)(D)").

Similarly, as he argued to the Seventh Circuit, Mr. Cervantes' claim that the IJ and BIA decisions deprived him of due process would also be uniformly considered a reviewable constitutional claim by other courts of appeals. *See, e.g., Garcia v. Gonzales,* 462 F.3d 287, 290-91 (3rd Cir. 2006) ("We exercise plenary review over Garcia's ... constitutional argument that the IJ and BIA deprived him of due process of law."); *Munoz-Yepez v. Gonzales, supra*; *Kaweesa v. Gonzales, supra.*

The "totality of the circumstances" test is universally accepted as the appropriate legal standard for adjudicating a motion to rescind an *in absentia* deportation order, based on "exceptional circumstances." *See, e.g., Alrefae v. Chertoff,* 471 F.3d 353, 360 (2nd Cir. 2006); *Uriostegui v. Gonzales,* 415 F.3d 660, 664 (7th Cir. 2005);[11] *Tang v. Ashcroft,* 354 F.3d 1192, 1194 (10th Cir. 2003); *Denko v. INS*, 351 F.3d 717, 723 (6th Cir. 2003); *Herbert v. Ashcroft,*

---

[11] Significantly, the alien in *Uriostegui* did not urge that the BIA failed to apply the "totality of the circumstances" standard. Rather, she argued, *id.* at 663:

> that the BIA erred by refusing to find that her misunderstanding of the month in which her hearing was to occur was not [sic] an exceptional circumstance that excused her failure to appear ...

325 F.3d 68, 72 (1st Cir. 2003); and *Singh v. INS,* 213 F.3d 1050, 1052 (9th Cir. 2000).

Examples of matters to be considered under this standard include:

- Whether the alien promptly notified the immigration court of his/her error, followed promptly by the filing of a motion to reopen. *In re B-A-S-*, 22 I&N Dec. 57, 59 (BIA 1998);

- Whether the motion to reopen is supported by evidence providing a detailed and plausible explanation for the failure to appear. *Matter of J-P-*, 22 I&N Dec. 33 (BIA 1998);

- Whether the alien's underlying claim has a reasonably good chance for success. *Kaweesa v. Gonzales,* 450 F.3d at 72; *Herbert v. Ashcroft,* 325 F.3d at 72;

- Whether the alien had requested a continuance, either before or at the hearing. *Herbert, supra* at 72; *Romero-Morales v. INS,* 25 F.3d at 129-30; *Matter of W-F-*, 21 I&N Dec. at 508;

- Whether the government would be inconvenienced if the motion to reopen were granted. *Kaweesa, supra,* 450 F.3d at 69;

- The hardship to the alien if the motion to reopen were denied. *Kaweesa, supra*; and

- Whether the alien would be unconscionably deprived of his or her day in court if the motion to reopen were denied. *Kaweesa, supra* at 70, n.13.

All of the above factors, if considered, would have favored Mr. Cervantes. Additional factors relevant to the "totality

of the circumstances" standard include his advanced age; the fact that he had assiduously fought for the right to seek such relief through various judicial and administrative bodies; that in ten years, he had never previously missed a hearing, including approximately seven appearances before the Immigration Judge who ordered him deported *in absentia*; that his §212(c) application was both strong and well documented; that he promptly filed his motion to reopen, presenting a *bona fide* reason for his error; and the fact that the Immigration Judge who refused to grant a brief continuance, and denied his motion to reopen, had previously been involved in his case, opposing both his habeas corpus petition, and his motion to reopen to apply for relief under the *St. Cyr* regulations. App. at pp.11, 24-42; *Cervantes-Manzo v. INS, supra.*

With the possible exception of the strength of his §212(c) application, these are undisputed facts. The application of the law to these facts is precisely the type of challenge contemplated by Congress in enacting 8 U.S.C. §1252(a)(2)(D). Only the Seventh Circuit considers otherwise.

VII. CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to the Seventh Circuit, to hear Mr. Cervantes' petition for review on its merits. He also urges that, pursuant to 8 C.F.R. §1240.47 (2006); and Rules 16, and 17(b)(1)(A), Fed. Rules App. Proc., this Court order the Seventh Circuit to direct Respondent to prepare and file the transcripts of the hearings conducted in this case following remand by the BIA for him to pursue his §212(c) application, and to thereafter permit supplemental

briefing, so that he may pursue his claim of bias on the part of Immigration Judge Giambastiani.

Respectfully submitted,

LISA S. BRODYAGA, ESQ.
REFUGIO DEL RIO GRANDE
17891 Landrum Park Road
San Benito, Texas 78586
(956) 421-3226 (voice)
(956) 421-3423 (fax)

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UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 25, 2006
Decided October 20, 2006

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

ROBERTO CERVANTES-MANZO, *Petitioner*,	)	Petition for Review of an Order of the Board of Immigration Appeals.
No. 06-2163 **v.**	)	
ALBERTO R. GONZALES, *Respondent.*	)	No. A12-642-275

Order

Roberto Cervantes-Manzo was ordered removed from the United States to his native Mexico because of his multiple felony convictions. More than six years ago, we dismissed his petition for review of that removal order, because his convictions qualify as "aggravated felonies" and prevent judicial review. 8 U.S.C. §1252(a)(2)(C).

After we dismissed his petition, Cervantes-Manzo moved to reopen the administrative proceeding so that he could apply for discretionary relief. That request was

granted, and a hearing was scheduled before an immigration judge. At the request of Cervantes-Manzo, the hearing was delayed repeatedly and finally set for October 11, 2005. When that time came, everyone except Cervantes-Manzo was present. The immigration judge waited 75 minutes, and when Cervantes-Manzo still had not appeared reinstated the removal order. Three days later Cervantes-Manzo filed another motion to reopen, which was denied. The Board of Immigration Appeals affirmed, and Cervantes-Manzo has filed another petition for judicial review.

As his brief in this court relates matters, he has been ordered removed from the United States for no better reason than giving insufficient attention to the calendar. That's not remotely correct. He has been ordered removed for multiple, serious felony convictions. He asked for extraordinary relief from the predicament in which his criminal conduct had placed him, and when the agency gave him that opportunity – and postponed the hearing date at his request, allowing him to remain in the United States for several additional years – he failed to appear. At some point patience must run out.

The argument that this court should direct the agency to give him still more opportunities to present his request for discretionary relief runs into the same problem that led us to dismiss the petition in 2000: an alien convicted of aggravated felonies is not entitled to judicial review. Although the Real ID Act of 2005 permits review of strictly legal issues, see 8 U.S.C. §1252(a)(2)(D), a contention that the agency has erred in balancing multiple factors under an open-ended standard is not a legal argument. See *Tunis v. Gonzales,* 447 F.3d 547 (7th Cir. 2006); *Boakai v. Gonzales,* 447 F.3d 1, 4 (1st Cir. 2006).

Application of a multi-factor standard is the very sort of discretionary call that the statute leaves to the agency.

The petition for review is dismissed for want of jurisdiction.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A12 642 275 – Chicago Date: MAR 30 2006

In re: ROBERTO CERVANTES-MANZO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carlina Tapia-Ruano, Esquire

ON BEHALF OF DHS: Lynn Hollander, Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We agree with the Immigration Judge that the respondent failed to establish that his failure to appear for his hearing on October 11, 2005, was caused by exceptional circumstances. Although the respondent may not have intended to avoid appearing in court, and thought his hearing was to be held on October 12, 2005, such confusion was correctly determined to not rise to the level of an exceptional circumstance. We further have considered the respondent's argument in his brief that the Immigration Judge was predisposed to deny his motion because the Immigration

Judge did not wish to adjudicate the respondent's application for 212(c) consideration. The respondent has provided no evidence to support his contention. We therefore cannot find the Immigration Judge displayed bias or denied the respondent a fair resolution of his motion.

/s/ Roger A. Pauley
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

FILE: A-12-642-275

IN THE MATTER OF:	)	
Roberto CERVANTES- Manzo	)	**In Deportation Proceedings**
Respondent	)	

RULING ON RESPONDENT'S MOTION TO REOPEN AND RESCIND *IN ABSENTIA* DEPORTATION ORDER

On October 14, 2005, the Respondent, filed a motion requesting that the Court reopen proceedings and rescind the order of deportation entered *in absentia* on October 11, 2005. The respondent argues that he did not appear for his hearing due to exceptional circumstances and that reopening is justified under Section 242B(c)(3) of the Immigration and Nationality Act (INA) (the law in effect at the time respondent was served with the Order to Show Cause (OSC) dated November 30, 1993).

The respondent does not argue that he failed to receive notice of his hearing. In fact, his attorney was present at his hearing on October 11, 2005 and was unable to explain the respondent's absence and stated that she had attempted to contact her client by telephone but without success.

In light of these facts and the Court's prior determination that the respondent was deportable as charged on the OSC, the government moved that the respondent be ordered deported in absentia and that his application for a

waiver under Section 212(c) of the Act be deemed abandoned. The Court granted the government's motion and ordered the respondent removed to Mexico on the charges contained in the Order to Show Cause (Ex. 1). In his ensuing motion to reopen, the respondent argues that his failure to appear should be excused because of a calendaring error on his part that led him to believe that his hearing was scheduled for October 12, 2005, instead of October 11, 2005.

The Court finds that the respondent has not demonstrated that the requisite "exceptional circumstance" exists in this case which would merit reopening as prescribed by the INA under Section 242B(c)(3). The term "exceptional circumstances" refers to exceptional circumstances beyond the control of the alien such as the serious illness of the alien or the death of an immediate relative but not including less compelling circumstances. Section 242B(f)(2) of the Act. The respondent was provided with his hearing date at an earlier hearing and it was only through his own error that he mis-calendared the hearing date. He also failed to maintain contact with his attorney prior to the hearing thus missing an opportunity to ensure his appearance on the correct date and at the correct time. Therefore, I find that the respondent failed to appear not due to exceptional circumstances but due to less compelling circumstances, namely, his failure to take all necessary and diligent action in advance of the actual hearing date. The respondent simply has not adequately satisfied her burden of proving the "exceptional circumstances" that would warrant reopening. See generally, *In re S-A-* 21 I&N Dec. 1050 (BIA 1977).

The respondent's motion is hereby DENIED.

DATE: October 31, 2005 /s/ Jennie Giambastiani
JENNIE GIAMBASTIANI
IMMIGRATION JUDGE

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:	Case No.: A12-642-275
CERVANTES-MANZO, Roberto	Docket: Chicago
RESPONDENT/APPLICANT	IN Deportation PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On October 11, 2005, at 10:15 AM/PM, pursuant to proper notice, the above entitled matter was scheduled for a hearing before an Immigration Judge for the purpose of hearing the merits relative to the respondent's/applicant's request for relief from deportation/exclusion. However,

☐ the respondent/applicant was not present.

☒ the respondent's/applicant's representative was present; however, the respondent/applicant was not present.

☐ neither the respondent/applicant nor the respondent's/applicant's representative was present.

Therefore, as no good cause was given in regard to the failure to appear at the hearing concerning the request for relief, I find that the respondent/applicant has abandoned any and all claim(s) for relief from deportation/exclusion.

Wherefore, the issue of deportability/excludability having been resolved, it is **HEREBY ORDERED** for the reasons set forth in the Immigration and Naturalization Service charging document

☐ that the applicant be excluded and deported from the United States.

☒ that the respondent be deported from the United States to MEXICO

/s/ Jennie Giambastiani
Immigration Judge
Date: 10/11/05

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

FILE: A-12-642-275

IN THE MATTER OF:)
Roberto CERVANTES- MANZO)
Respondent)

PRE-HEARING ORDER *(Corrected)*

The respondent is scheduled to appear before the undersigned Immigration Judge on May 17, 2005 at 1:00 p.m. for a hearing on the merits of a waiver application under Section 212(c) of the Immigration and Nationality Act.

In order to best assess the respondent's eligibility for this discretionary waiver, the respondent is hereby ordered to file and serve on the Immigration Court and the Department of Homeland Security (Office of Chief Legal Counsel) at Chicago, Illinois, the **Pre-Sentence Investigative Report(s)** prepared in conjunction with each of the respondent's criminal convictions. These reports must be filed by no later than close of business on May 7, 2005.

DATE: 3/30/04

/s/ Jennie Giambastiani
JENNIE GIAMBASTIANI
IMMIGRATION JUDGE

Served on:

X Respondent's Attorney/Representative
X INS District Counsel

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A12 642 275 – Chicago Date: OCT 19 2001

In re: ROBERTO CERVANTES-MANZO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Marta Delgado, Esquire

ON BEHALF OF SERVICE: Sylke Marchan
Assistant District Counsel

ORDER:

PER CURIAM. The respondent has filed a timely "Special 212(c) Motion" as allowed for under 8 C.F.R. § 3.44. The respondent seeks reopening to apply for section 212(c) relief based on a change in the law regarding eligibility implemented by 8 C.F.R. §212.3(g), which provides that section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, shall not apply to any applicant for section 212(c) relief whose deportation proceedings were commenced before the Immigration Court before April 24, 1996.

The documentation before the Board does not show that the respondent is ineligible for reopening. Accordingly, the "Special 212(c) Motion" is granted.

FURTHER ORDER: The proceedings are reopened and the record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion.

/s/ Juan P. Osuna
FOR THE BOARD

EXHIBIT
May 17 2005
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U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board of
Immigration Appeals

Falls Church, Virginia 22041

File: A12 642 275 – Chicago Date: FEB 25 1999

In re: ROBERTO CERVANTES-MANZO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Larry E. Adkinson, Esquire
79 West Monroe, Suite 812
Chicago, Illinois 60603

ON BEHALF OF SERVICE:
Lynn K. Hollander
Assistant District Counsel

ORDER

PER CURIAM. The respondent is seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, the respondent is statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii) (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214

("AEDPA") § 440(d); *Matter of Soriano,* Interim Decision 3289 (A.G., Feb. 21, 1997). The respondent's lack of eligibility is not affected by the fact that the respondent was convicted prior to the date of enactment of AEDPA. *Matter of Soriano, supra.*

The respondent has argued on appeal that AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. The respondent further argues that AEDPA is unconstitutional because of its retroactive effect. This Board is without authority to rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of Fuentes-Campos,* Interim Decision 3318 (BIA 1997); *Matter of C-,* 20 I&N Dec. 529 (BIA 1992). Furthermore, we note that this Board is bound to follow the Attorney General's decision in *Matter of Soriano, supra.* 8 C.F.R. § 3.1(d)(2) (1997).

For the reasons stated above, the respondent's appeal is dismissed.

/s/ Michael J. Heilman
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Chicago, Illinois

File No.: A 12 642 275 May 13, 1997

In the Matter of	)	
ROBERTO CERVANTES-MANZO	)	IN DEPORTATION PROCEEDINGS
Respondent	)	

CHARGES: I&N Act – Section 241(a)(1)(A) – At that time of entry for adjustment of status within one or more of classes of aliens who are excludable by law existing at that time: to wit, aliens convicted of a violation of any law or regulation of a State, United States, or foreign country relating to a controlled substance under Section 212(c)(2)(A)(i)(II) of the Act; I&N Act – Section 241(a)(2)(B)(i) – At any time after entry convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802); I&N Act – Section 241(a)(2)(A)(iii) – At any time after entry has been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

APPLICATION: Section 212(c), I&N Act – Waiver of Inadmissibility.

ON BEHALF OF RESPONDENT:

Larry E. Adkison, Esq.
79 West Monroe Street,
Ste. 812
Chicago, Illinois 60603

ON BEHALF OF SERVICE:

Joseph M. Yeung
Assistant District Counsel
Chicago, Illinois 60604

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 61-year-old married male. He is a native and citizen of Mexico, who last entered the United States on or about May 1, 1991, and has been a legal permanent resident since September 6, 1961. The Immigration and Naturalization Service ("INS"), commenced deportation proceedings by filing an Order to Show Cause on November 2nd, 1995, charging the respondent as being deportable under the above-mentioned sections of law (Ex. 1).The respondent, through counsel, admitted the allegations contained in the Order to Show Cause, and conceded deportability on all three charges. Therefore, deportability has been established by clear, convincing, and unequivocal evidence. The respondent designated Mexico as the country of deportation and sought relief in the form of Section 212(c): waiver of inadmissibility.

Section 212(c) permits a waiver of certain grounds of deportability in a deportation hearing if there are analogous grounds of inadmissibility. See *Francis v. INS,* 532 F.2d 268 (2nd Cir. 1976); *Matter of Silva,* 16 I&N Dec. 26, 28 (BIA 1976). In order to qualify for this 212(c) waiver, the alien must show that he has been a lawful permanent resident for seven consecutive years, and that he merits an exercise of discretion. See *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978). The requirements for a Section 212(c)

waiver were amended by the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (April 14, 1996). Under Section 440(d) of AEDPA, an alien who has committed any crime covered in Sections 241(a)(2)(A)(iii), and (B), (C), or (D), or any offense covered by Section 241(a)(2)(A)(ii) for which both (indiscernible) offenses are covered by Section 241(a)(2)(A)(I)(i), and he is ineligible for a 212(c) waiver. The Attorney General has recently decided that these amendments apply to applications for 212(c) relief, including those pending or April the 24th, 1996, the date on which AEDPA was enacted. *Matter of Soriano,* Int. Dec. 3289 (BIA 1996); *A.G.* (2-21-1997).

The respondent is statutorily ineligible for a 212(c) waiver, because he has been convicted of the following crime which is covered in Section 241(a)(2)(A)(iii) of the Act as an aggravated felony is defined under Section 101(a)(43) of the Act, and is amended by Section 321(a) of the Illegal Immigration and Immigrant Responsibility Act of 1996 ("IIRIRA"). The respondent's conviction as enumerated above, clearly brings him within the purview of the definition of an aggravated felon. Therefore, the respondent is statutorily ineligible for a 212(c) waiver.

Exhibit 2 in the record is a copy of the respondent's conviction has alleged in Allegation No. 4 in the Order to Show Cause. This conviction reflects that on April 23rd, 1993, he was found guilty of the offense of possession with intent to distribute cocaine in violation of Title XXI, 841(a)(1) and Title XVIII, U.S.C. 2. As a result of this conviction, he was sentenced to 57 months in prison.

In addition, the respondent's conviction renders him ineligible for any other discretionary relief from deportation, including voluntary departure.

Accordingly, the following orders will be entered:

ORDER

IT IS ORDERED that the respondent's application for a waiver of inadmissibility under Section 212(c) of the Act be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Mexico on the charges contained in the Order to Show Cause.

ANTHONY D. PETRONE
Immigration Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2006

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

ROBERTO CERVANTES-MANZO,
Petitioner,

No. 06-2163 **v.**

ALBERTO R. GONZALES,
Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

No. A12-642-275

Order

Petitioner filed a petition for rehearing on November 2, 2006. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

"REAL ID Act of 2005" 109 P.L. 13

TITLE I – AMENDMENTS TO FEDERAL LAWS TO PROTECT AGAINST TERRORIST ENTRY Sec. 106. JUDICIAL REVIEW OF ORDERS OF REMOVAL.

(a) In General. – Section 242 of the Immigration and Nationality Act (8 U.S.C. 1252) is amended –

(1) in subsection (a) –

(A) in paragraph (2) –

(i) subparagraph (A), by inserting "(statutory or non-statutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "Notwithstanding any other provision of law";

(ii) in each of subparagraphs (B) and (C), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D)" after "Notwithstanding any other provision of law"; and

(iii) by adding at the end the following:

"(D) Judicial review of certain legal claims. – Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."; and

(B) by adding at the end the following:

. . .

"(5) Exclusive means of review. – Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act, except as provided in subsection (e). For purposes of this Act, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms 'judicial review' and 'jurisdiction to review' include habeas corpus review pursuant to section 2241 of title 28, United States Code, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).";

(2) in subsection (b)(9), by adding at the end the following: "Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28, United States Code, or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact."; and

(3) in subsection (g), by inserting "(statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title" after "notwithstanding any other provision of law".

(b) Effective Date. – The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division.

. . .

(d) Transitional Rule Cases. – A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), as amended by this section. Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion.

EXHIBIT
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JENNIE GIAMBASTIANI
DISTRICT COUNSEL
By: Sylke Merchan
Assistant District Counsel
Immigration & Naturalization Service
55 E. Monroe St., Suite 1700
Chicago, IL 60603

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:)	
)	
Roberto Cervantes-Manzo)	File No.: A1 642 275
)	
In Deportation Proceedings)	

SERVICE'S RESPONSE TO RESPONDENT'S MOTION TO REOPEN

* * *

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO

FILE: A12-642-275

DATE: Jun 17, 2005

TO: CARLINA TAPIA-RUANO
MINSKY, MC CORMICK & HALLAGAN
122 SOUTH MICHIGAN, SUITE 1800
CHICAGO, IL 60603

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Oct 11, 2005 at 9:00 A.M. at:

55 EAST MONROE ST., COURTROOM-A
CHICAGO, IL 60603

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Immigration and Naturalization Service and held for further action. OR (2) Your hearing may be held in your

absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Immigration and Naturalization Service established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT CHICAGO, IL THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call

toll free 1-800-898-7180 or 703-305-1662. *YOU MUST BRING PHOTO IDENTIFICATION TO ENTER THE BUILDING.*

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL. (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN's ATT/REP [X] INS

DATE: 6-20-05 BY: COURT STAFF [Illegible] V3

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO
FILE: A12-642-275

DATE: May 20, 2005

TO: CARLINA TAPIA-RUANO
MINSKY, MC CORMICK HALLAGAN
122 SOUTH MICHIGAN, SUITE 1800
CHICAGO, IL 60603

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Jun 21, 2005 at 9:00 A.M. at:

55 EAST MONROE ST., COURTROOM-A
CHICAGO, IL 60603

* * *

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL. (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN's ATT/REP [X] INS

DATE: 5-20-05 BY: COURT STAFF [Illegible] V3

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

EXHIBIT 12
May 17, 2005

DATE: May 2, 2005

TO: Immigration Judge Jennie Giambastiani
Executive Office Of Immigration Review
Office of the Immigration Judge
55 E. Monroe, Suite 1900
Chicago, Illinois

FROM: Carlina Tapia-Ruano
Minsky, McCormick & Hallagan, P.C.
122 S. Michigan, Suite 1800
Chicago, IL 60603
Phone: 312-427-6163
Fax: 312-427-6513

RE: CERVANTES, Roberto
A 12 642 275
In Removal Proceedings
Individual Date: May 17, 2005 at 1:00 p.m.

Index of Additional Documents in Support of Application for Waiver 212(c) Waiver

Evidence of Hardship to Respondent and Members of his Family:

1. Affidavit of Santa Ana Cervantes, wife of respondent, dated 1-30-04, attesting to her and her children's hardship if the respondent is deported from the US.

2. Affidavit of Sergio Cervantes, son of respondent, dated 4-26-05, attesting to his hardship if father is deported from the US.

3. Affidavit of George Cervantes, 35-year-old son of respondent, dated 4-26-05, attesting to his hardship if father is deported from the US.

4. Affidavit of Roberto Cervantes, Jr., 23-year-old son of respondent, dated 4-29-05 attesting to his hardship if father is deported from the US.

5. Record from Triton College regarding Roberto Jr., attesting to his status as a student there.

6. Affidavit of Ana Maria Cervantes, 21-year-old daughter of respondent, dated 4-29-05, attesting to her hardship if father is deported from the US.

7. Records from Triton College regarding Ana Maria Cervantes, attesting to her status as a student there.

8. Copy of US Birth Certificate of Frederick Cervantes, son of the respondent, born on 9-4-63.

9. Death Certificate of Frederick Cervantes, son of respondent, listing date of death as 12-14-02 (along with English translation.)

10. Affidavit of Margarita Cervantes, widow of Frederick Cervantes, who was the son of respondent, dated 4-28-05, attesting to her and her 3 children's hardship if her father-in-law, the grandfather of her children, is deported from the US.

11. Copy of permanent resident card, Form I-551, of Margarita Cervantes (nee: Mendoza).

12. Copy of marriage certificate of Frederick Cervantes and Margarita Mendoza.

13. Affidavit of Alexander Cervantes, teenage son of Frederick Cervantes, dated 4-28-05, attesting to his hardship if his grandfather is deported from the US.

14. School record from Reavis High School verifying the student status of Alexander Cervantes.

15. Affidavit of Mayra Cervantes, granddaughter of respondent, dated 4-28-05, attesting to her hardship if her grandfather is deported.

16. Copies of school records from Loyola University of Chicago, verifying Mayra's status as a student there.

17. US Birth Certificate of Gabriel Andrew Cervantes, grandson of the respondent, born on 7-31-03.

18. US Birth Certificate of George Hugo Cervantes, Jr., grandson of the respondent, born on 2-19-97.

19. Affidavit of Manuel M. Cervantes, brother of respondent, dated 1-20-04, attesting to his family's hardship if the respondent is deported from the US.

20. Affidavit of Candelaria Garcia, former spouse of respondent, and mother of his two oldest sons, dated 4-26-05, attesting to the hardship of her children if the respondent is deported from the US.

21. Certificate of Naturalization of Candelaria Garcia.

Evidence of Hardship due to Medical Condition:

22. Medical note from Dr. Ahuad L. Abdala, dated 4-27-05, attesting to respondent's medical condition of Hypertension and heart aliment [sic].

23. Medical note from Dr. Ahuad L. Abdala, dated 4-27-05, attesting to Santa Ana, respondent's wife, medical condition of Hypertension, heart ailment, anxiety and depression.

Evidence of Respondent's Financial and other Contributions to the Community

24. Letter dated 4-8-05, from Rev. Hector Palos, Associate Pastor of Our Lady of Mt. Carmel Parish, documenting the membership and attendance of the respondent at the church.

25. Financial statement dated 1-8-04, documenting some of respondent's contributions to the church.

26. Letter from Mayor Ronald Serpico, of Village of Melrose Park, providing a personal character reference regarding the respondent.

27. Copy of commercial contract for purchase of business. Circle Universal Truck Wash Co., by respondent and spouse in June 2002.

28. US Corporate Federal Income Tax Return for 2004 for Circle Universal Truck Wash Co in Texas. This corporation is whole [sic] owned and managed by the respondent and his wife.

29. Copy of the Settlement Agreement for the purchase of Circle Universal Truck Wash Co. by the respondent and his wife in April 2002.

30. Affidavit dated, 4-21-05, by 15 employees of the Circle Universal Truck Wash Co. attesting to their hardship if the respondent is deported, resulting in the closing of the business. (Includes copies of their 2004 W-2 Forms.)

31. US Corporate Federal Income Tax Return for 2004 for Melrose Liquors, Inc., located in Melrose Park, Illinois. This corporation is whole [sic] owned and managed by the respondent and his wife.

32. Affidavits from 3 of Melrose Liquor's employees, dated April 2005, attesting to their hardship if the respondent owner of the business is deported, resulting in the closing of the business.

33. Copy of the Melrose Liquors Inc.'s Employer Contribution and Wage Report for the last quarter of 2004, listing the employees of the company.

34. US Individual Federal Income Tax Return for Respondent and spouse for 201 (including proof of social security benefits), 2002, 2003, and 2004.

Evidence relating to Respondent's Conviction Records

35. Copy of Police Report relating to the November 30, 1971 arrest of respondent for possession of a gun. Respondent was released without charge.

36. Copy of Police Report relating to January 1972 arrest of respondent based on anonymous phone tip by female.

37. Copy of the April 10, 1972 record for respondent relating to February 19, 1972 conviction for possession and intent to distribute a controlled substance (heroin). (Record includes the criminal docket relating to the case.)

38. Order from the US Court of Appeals for the 9th Circuit (California), dismissing respondent's appeal and affirming the 1972 conviction.

39. Copy of the Presentence Report relating to the April 23, 1993 conviction record for the respondent relating to possession and intent to distribute a controlled substance (cocaine).

40. Copy of Progress Report, dated 9-2-97, relating to the respondent's behavior as an inmate as documented by the US Probation Officer from the Northern District of Illinois.

41. Notice to respondent of successful completion of term of supervised release relating to 1993 conviction, issued by the US Probation Officer on February 19, 2002.

NOTICE OF HEARING IN
DEPORTATION PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Feb 24, 2004
FILE: A12-642-275

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON ST., STE. 2200
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for a [sic] ~~Master~~/Individual hearing before an Immigration Judge on May 17, 2005 at 1 pm at

55 EAST MONROE ST., COURTROOM-A
CHICAGO, IL 60603

* * *

NOTICE OF HEARING IN
DEPORTATION PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Dec 17, 2003
FILE: A12-642-275

Attention! Your Hearing Has been rescheduled. Disregard any notice you may have received before the above date.

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON ST., STE. 2200
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for a MASTER hearing before an Immigration Judge on Feb 24, 2004 at 10:30 A.M. at:

55 EAST MONROE ST., COURTROOM-A
CHICAGO, IL 60603

* * *

NOTICE OF HEARING IN
DEPORTATION PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Nov 27, 2002
FILE: A12-642-275

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON #504
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for an INDIVIDUAL hearing before an Immigration Judge on Feb 25, 2004 at 1:00 P.M. at:

55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

* * *

NOTICE OF HEARING IN
REMOVAL PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Nov 15, 2002
FILE: A12-642-275

Attention! Your Hearing Has been rescheduled. Disregard any notice you may have received before the above date.

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON #504
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for an INDIVIDUAL hearing before the Immigration Court on Jan 22, 2004 at 1:00 P.M. at:

55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

* * *

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL. (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN's ATT/REP [X] INS

DATE: 11-15-02 BY: COURT STAFF BKH V3

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

BKH

NOTICE OF HEARING IN
REMOVAL PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Feb 19, 2002
FILE: A12-642-275

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON #504
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for a Master/Individual hearing before an Immigration Judge on Feb 10, 2003 at 1:00 p.m. at:

55 EAST MONROE ST., COURTROOM B
CHICAGO, IL 60603

* * *

NOTICE OF HEARING IN
REMOVAL PROCEEDINGS
IMMIGRATION COURT
55 EAST MONROE ST., SUITE 1900
CHICAGO, IL 60603

RE: CERVANTES-MANZO, ROBERTO DATE: Oct 24, 2001
FILE: A12-642-275

TO: MARTA DELGADO
SCOTT D. POLLOCK & ASSOC.
105 W. MADISON #504
CHICAGO, IL 60602

Please take notice that the above captioned case has been scheduled for a MASTER hearing before the Immigration Court on Feb 19, 2002 at 9:00 A.M. at:

55 EAST MONROE ST., COURTROOM B
CHICAGO, IL 60603

* * *

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL. (M)
PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN's ATT/REP [X] INS

DATE: 11-15-02 BY: COURT STAFF CSW V3

Attachments: [ ] EOIR-33 [ ] EOIR-28
[ ] Legal Services List [ ] Other

CSW

J.S. Department of Justice
mmigration and Naturalization Service

Application for Advance Permission to Return To Unrelinquished Domicile

(See instructions on reverse,
Please typewrite or print plainly in ink)

FEE STAMP
Alien Registration No. A12 642 275
Date May 4, 2001

1) I hereby apply for permission to return to the United States under the authority contained in Section 212(c) of the Immigration and Nationality Act.

MY NAME IS: (*First*)	(*Middle*)	(*Last*)
Roberto		Cervantes-Manzo

DATE OF BIRTH: (*Month, day, year*)	PLACE OF BIRTH: (*City, province, country*)	I AM A CITIZEN OF: (*Country*)
5/5/36	San Antonio Guaracha Michoacan Mexico	Mexico

PRESENT ADDRESS: (*Street and number, apt. no., city, state, country*)
1581 N. 9th Avenue, Melrose Park, IL, USA

2) I was lawfully admitted to the United States for permanent residence at:

PORT:	DATE: (*Month, day, year*)	NAME OF VESSEL OR OTHER MEANS OF CONVEYANCE:
San Ysidro, California	9/5/61	Walking

3) Since that admission I have departed from and reentered the United States as follows:

DEPARTED FROM THE UNITED STATES			RETURNED TO THE UNITED STATES			PURPOSE OF TRIP
PORT	DATE (Month, day, year)	VESSEL OR OTHER MEANS OF CONVEYANCE	PORT	DATE (*Month, day, year*)	VESSEL OR OTHER MEANS OF CONVEYANCE	
Chicago	May 1991	Airline	Chicago	June 1991	Airline	Father sick
Chicago	Dec. 1987	Airline	Chicago	Jan. 1988	Airline	Vacation
Chicago	02/18/1984	Airline	Chicago	05/18/1984	Airline	Vacation

4) During the past 7 years I have resided at the following places: (*List present address first*)

(Complete Address – Include Apt. No.)	From –	To –
1581 N. 9th Avenue, Melrose Park, IL, USA	Sept. 1996	Present time
5001 S. Talman, Chicago, IL	Nov. 1995	Sept.1996
71 W. Van Buren, Chicago, IL	Sept. 1991	Nov. 1995

5) During the past 7 years I have been employed as follows: (List present *employment first*)

From –	To –	Employer's Name	Address	Occupation or Type of Business
Nov. 1995	Present	Melrose Liquor Inc	Melrose Park, Illinois	Co-Owner

(6) My immediate family consists of the following persons:

Name	Relation	Date and Country of Birth	Citizen of	Present Address
Santan Ana Cervantes	Spouse	07/25/55, Mexico	USA	With Me
Roberto Cervantes, Jr.	Son	05/10/82, USA	USA	With Me
Ana Maria Cervantes	Daughter	08/17/83, USA	USA	With Me
See attached				

(7) I _____ (*Intend to or have*) depart(ed) temporarily from the United States on or about _____ (*Date*) and will remain in _____ (*Country*) approximately _____ (*Length of Time*), for the purpose of _____, and expect to apply for admission at _____ (*Port*)

RECEIVED	TRANS. IN	RET'D-TRANS. OUT	COMPLETED

(8) I believe I may be inadmissible to the United States for the following reasons:

I have a 1972 conviction for possession of heroin with intent to distribute and a 1993 conviction for
possession of cocaine with intent to distribute

I understand that the information herein contained may be used in any criminal or civil proceedings, including deportation or exclusion, hereafter instituted against me.

I certify that the statements above are true and correct to the best of my knowledge and belief.

/s/ Roberto Cervantes-Manzo

SIGNATURE OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT

I declare that the document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge

/s/ Marta Delgado	Scott D. Pollock & Assoc. 105 W. Madison, #504 Chicago, IL 60602	5-4-01
(*Signature*)	(*Address*)	(*Date*)

Decision:

☐ Application granted upon the following terms and conditions:

DATE OF ACTON

DD DISTRICT

ATTACHMENT TO FORM I-191
Application for Advance Permission

Name: Roberto CERVANTES-MANZO
Alien No. A12 642 275

Question 6. Immediate Family Members (Cont.)

Name	Relation	Date & Country Of Birth	Citizen Of	Address
Frederick Cervantes	Son	9/4/63 USA	USA	Chicago, IL
Sergio Cervantes	Son	04/1966 USA	USA	California
Jorge Cervantes	Son	2/22/70 USA	USA	California
Maria Carmen Cervantes	Sister	1951 approx. Mexico	Mexico	Chicago, IL
Manuel Cervantes	Brother	1948 approx. Mexico	USA	California

No. 06-2163

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Roberto Cervantes-Manzo,
Petitioner,

v.

Alberto R. Gonzales, U.S. Attorney General,
Respondent.

Motion for Supplementation of the
Certified Administrative Record

TAPIA-RUANO & GUNN P.C.
Carlina Tapia-Ruano
Jeffrey W. Gunn
122 S. Michigan Ave.
Suite 1800
Chicago, IL 60603
(312) 267-4987
Attorneys for Petitioner,
Roberto Cervantes-Manzo

The petitioner, Roberto Cervantes-Manzo, by and through its undersigned attorneys, moves the Court for an order requiring the Department of Homeland Security (DHS) to supplement certain omitted parts of the record in this matter, all pursuant to FRCP 16(b) and 17(b)(3).

In support of support of this motion, the petitioner states as follows:

1. This is an appeal from a decision by the Board of Immigration Appeals (BIA).

2. On June 16, 2006, the DHS filed the certified administrative record, although it did not serve counsel for petitioner until June 30, 2006.

3. The record filed by DHS is incomplete. It omits the transcripts of three hearings before the Immigration Court, occurring on February 24, 2004, May 17, 2005, and October 11, 2005.

4. Testimony, findings and rulings made during these hearings are critical to petitioner's argument on appeal. The petitioner intends to rely on the transcripts of these hearings, pursuant to FRCP 10(b)(2).

5. Petitioner is required to file his initial brief on or before July 25, 2006.

Wherefore, in the circumstances, the petitioner respectfully requests the Court to issue the following order:

A. That within 45 days of this Court's order, the DHS shall transcribe and file the record of the hearings occurring in this matter on February 24, 2004, May 17, 2005, and October 11, 2005;

B. That the filing date for the petitioner's initial brief be postponed until within 30 days after the DHS has filed said transcripts; and

C. That this Court grant such other relief it deems appropriate.

/s/ Carlina Tapia-Ruano
Carlina Tapia-Ruano
Jeffrey W. Gunn
Attorneys for Petitioner,
Roberto Cervantes-Manzo

Dated: July 7, 2006

LAW OFFICES OF
SCOTT D. POLLOCK & ASSOCIATES
ATTORNEYS AT LAW
20 N. WACKER DR., SUITE 3330
CHICAGO, IL 60606

TEL: (312) 444-1940
FAX: (312) 444-1960
E-MAIL: [ILLEGIBLE]
WEB: HTTP://WWW.LAWFIRM1.COM

March 22, 1999

Brian Perryman
District Director
U.S. Immigration and Naturalization Service
10 W. Jackson Boulevard
Chicago, Illinois 60604

Re: Roberto Cervantes-Manzo, A12 642 275

Dear Mr. Perryman:

Enclosed please find a copy of the Petition for a Writ of Habeas Corpus filed in the above-referenced case. Pursuant to Rule 24 of the United States District Court for the Northern District of Illinois, the filing of this petition prohibits the INS from moving petitioner outside the jurisdiction of the court.

Please contact me if you have any questions about this matter.

Sincerely,

/s/ Scott D. Pollock
Scott D. Pollock
Attorney at Law

SDP/klj

cc: 1. INS Deportation Branch
2. Jennie Gianbastiani, INS Deputy District Counsel
3. U.S. Attorney's Office – Civil Division

App. 47

No. 06-2163

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Roberto Cervantes-Manzo,
Petitioner,

v.

Alberto R. Gonzales, U.S. Attorney General,
Respondent.

Petition for Review of the Decision of the
Board of Immigration Appeals
B.I.A. Case No. A12 624 275

BRIEF AND REQUIRED SHORT APPENDIX OF PETITIONER, ROBERTO CERVANTES-MANZO

Carlina Tapia-Ruano
Jeffrey W. Gunn
TAPIA-RUANO & GUNN P.C.
122 S. Michigan Ave.
Suite 1800
Chicago, IL 60603
(312) 267-4987
Attorneys for Petitioner,
Roberto Cervantes-Manzo

JURISDICTIONAL STATEMENT

On March 30, 2006, the Board of Immigration Appeals ("BIA") denied petitioner's appeal of the Immigration Judge's dismissal of a motion to reopen an order of

deportation in absentia, adopting and affirming the decision of the Immigration Judge ("IJ").[1] (R. 2.)

On April 26, 2006, this petition for review was filed.

The petitioner was placed in deportation proceedings prior to April 1, 1997. (R. 557-567.) As such, the Court has jurisdiction "to review the BIA's refusal to reopen deportation proceedings pursuant to the now-repealed INA § 106(a), 8 U.S.C. § 1105a(a), as amended by the transitional rules governing judicial review, which are codified at IIRIRA § 309(c)(4)." *Socop-Gonzalez v. INS,* 272 F.3d 1176, 1183 (9th Cir. 2000).

Moreover, this petition argues questions of law, both statutory and constitutional. Specifically, the petition argues that the BIA failed to apply the proper legal standard when deciding whether to reopen and rescind an order of deportation in absentia; and, alternatively, that its decision deprived the petitioner of due process of law. As such, the Court has jurisdiction to review the same. *Kaweesa v. Alberto R. Gonzales,* 450 F.3d 62, 68 (1st Cir. 2006) citing 8 U.S.C § 1252(a)(2)(D) ("If an IJ's denial of a motion to reopen constitutes an error of law or a violation of constitutional rights, we may review those issues.").

* * *

[1] Where the BIA adopts and affirms the IJ's decision without opinion, the IJ's decision becomes the final agency decision for purposes of appeal. *Vladimirova v. Ashcroft,* 377 F.3d 690, 695 (7th Cir. 2004); *Ursachi v. INS,* 296 F.3d 592, 594 (7th Cir. 2002).